United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

75-2134

To be argued by
PHYLIS SKLOOT BAMBERGER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA ex rel.
PAUL T. ROGERS,

Appellant,

-against-

J.J. NORTON, Superintendent,
Federal Correctional Facility,
Danbury, Connecticut;

PAUL REGAN, Chairman, New York
State Board of Parole; and

PETER PREISER, Commissioner of
Corrections, State of New York,

Appellees.

Docket No. 75-2134

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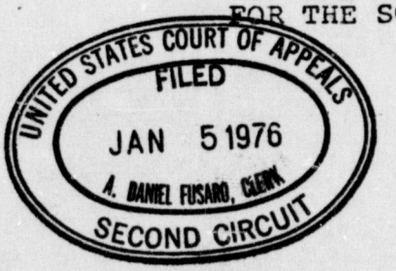
P/S

REPLY BRIEF FOR APPELLANT

ON APPEAL FROM AN ORDER
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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UNITED STATES COURT OF APPEALS
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UNITED STATES OF AMERICA ex rel. PAUL T. ROGERS, Appellant, -against- J.J. NORTON, Superintendent, Federal Correctional Facility, Danbury, Connecticut; PAUL REGAN, Chairman, New York State Board of Parole; and PETER PREISER, Commissioner of Corrections, State of New York, Appellees.	Docket No. 75-2134

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Respondent, insofar as its brief is intelligible, argues that appellant suffered no, or just a little bit of, prejudice from the unreasonably delayed parole revocation hearing.* The

*As was shown in the main brief for appellant, the hearing was delayed for nine months. The parole revocation warrant was

State agrees that "the conditions of petitioner's confinement could have been prejudiced in the three months between federal sentence on October 21, 1974, and the revocation of his parole on January 28, 1975." Indeed, appellant asserted in his petition that his conditions of confinement were adversely affected by the warrant, and that was one reason for his request for a prompt disposition of the matter -- a request summarily denied by the New York State Board of Parole.

The State next argues that, since appellant's parole was revoked and revocation would undoubtedly have resulted no matter when the hearing would have been held, he suffered no prejudice from the delay. However, this speculative approach as to what might have happened if the State acted properly is impermissible, and unreliable for predicting results (Gay v.

(Footnote continued from the preceding page)

issued on April 19, 1974. A hearing was not held until January 28, 1975.

On June 4, 1975, appellant was returned to State custody. He was released on parole in December 1975. This case is not rendered moot by the grant of parole (see State's brief, fn. at 9) because appellant claims that he is entitled to credit for parole time from April 17, 1974, to June 4, 1975, which would reduce his period on parole by about fourteen months.

After his release from custody on parole, appellant was re-arrested by the New York City police for a new crime. No parole violation warrant has been filed. However, under New York State law, even if appellant is found to be in violation of parole, he will not lose credit for the time earned on parole in the period prior to the violation. New York Penal Law, §70.40(3)(a) and note. Compare, N.Y.P.L. §70.40(1)(b), (2); see also New York Corrections Law, Former §§218, 219. Thus, this new arrest cannot affect the fourteen months' credit involved here.

U.S. Board of Parole, 394 F.Supp. 1374, 1379-1380 (E.D.Va. 1975). Revocation was directed only after the Parole Board was compelled, by the Supreme Court of the State, to grant a hearing. The court's decision was rendered after the Board publicly refused to give appellant a hearing upon a finding that the Board was functioning in an illegal manner. In addition, the minutes of the hearing indicate that the position of the New York State Board of Parole was that the Board had no duty even to produce appellant at any hearing to be given, but that it was the responsibility for appellant's attorney at the parole hearing to make such arrangements (Respondent's Appendix at 4-5). This attitude continued at the hearing.* Both the compulsion to give the hearing and the administrative difficulties it apparently caused the Board may have adversely affected the result of the proceeding.

Further, as indicated in the main brief, the minutes of the hearing show that the Parole Board did not consider that it had the power to re-release as a possible disposition in this case. Indeed, contrary to New York law, one of the commissioners stated that the Board could not grant parole release in cases where a new crime was involved.

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*This belief by the Board that it need not produce appellant at the hearing apparently raised some doubt as to when or if the hearing would be held, since the specific Legal Aid Society lawyer who had been representing appellant was on vacation on the date on which the hearing was ultimately scheduled. An adjournment would have put the hearing over until after the hearing before the Federal Parole Board, and the State Board protested having to transport appellant for another hearing.

However, discharge is a possible disposition under State law even when a new crime is involved (Donohue v. Montanye, 35 N.Y.2d 619 (1974); New York Correction Law, §212(7); 7 New York Code of Rules and Regulations, §1925.35(K)(2)(i)), and further, if parole is revoked, the Board can choose to re-release the parolee (New York Correction Law, §212(7); 7 New York Code of Rules and Regulations, §1925.35(K)(2)(i) and (ii)). See Donohue v. Montane, supra. Here, the Board's improper refusal to consider these alternatives was an abuse of power and deprived appellant of a fair hearing.* See United States v. Kaylor, 491 F.2d 1133, 1141 (2d Cir. en banc 1974); United States v. Clark, 475 F.2d 240, 250 n.15 (2d Cir. 1973); United States v. Wilson, 450 F.2d 495, 498 (4th Cir. 1971); United States v. Williams, 407 F.2d 940, 942 (4th Cir. 1969).

Further, even if the parole is revoked and the parolee re-incarcerated, the Board must determine a new eligibility date (New York Correction Law, §212(3)). Here, the Board put its determination as to a new release date off until the date of appellant's release from Federal custody, not because of appellant's conduct, but ostensibly because the Board did not know the date on which appellant would be released from Federal custody. However, this reasoning is incorrect, for the Board did know that if appellant's State parole were revoked,

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*Even under Blassingame and Buono, in evaluating whether there has been prejudice to a parolee because of a delay in the hearing, the court may look at the hearing itself.

he would be released from Federal custody no later than July 2, 1975, the maximum expiration date. This date would have been available to the State Parole Board even at an earlier hearing. The reason given by the Board for refusing to set a release date was disingenuous.* A properly reasoned decision would have taken into consideration that revocation with a long-delayed re-release date might have produced an earlier Federal parole date, the Federal authorities being satisfied that appellant would be in custody a sufficiently long period to reduce the need for Federal custody. In these circumstances, appellant would have begun service of the State delinquent time earlier. On the other hand, the failure by the State Board to set any re-release date may have resulted in a longer period in Federal custody, since the Federal Parole Board could not consider what State action would be.

Thus, it is not possible to know what disposition the Board would have made if it had given a timely and fair hearing, or the effect of that decision on the Federal Parole Board's deliberations. If appellant's parole had not been revoked, or if it had been revoked and appellant re-released, his sentence would have run concurrently with the Federal

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*The State's argument that the Federal authorities would have compelled service of the bulk of the Federal sentence is thus irrelevant.

sentence whenever it ended.* Further, even if revoked and given more time, the Board could have given concurrent time. New York Correction Law, §212(7). In addition, appellant might have been released to a Federal community treatment center.**

The respondent disposes of the prejudice accruing from the failure to have the opportunity for concurrency by stating in a footnote (Brief at 9) that the claim is one belonging to the Sixth Amendment speedy trial claims, and is not applicable to instances such as this. That position has been rejected by the New York courts, Allah v. Warden, 47 A.D.2d 485 (1st Dept. 1975); McNair v. Warden, 77 Misc.2d 150 (Kings County), affirmed, 46 A.D.2d 741 (2d Dept. 1974), as well as Federal courts,*** Cooper v. Lockhart, 489 F.2d 308 (8th Cir. 1973); Cleveland v. Ciccone, 517 F.2d 1082 (8th Cir. 1975); Hahn v. Revis, 520 F.2d 632 (7th Cir. 1965). It seems simplistic, but oviously necessary, to reiterate that if the State provides the opportunity for currency, the State cannot then foreclose the opportunity to seek that disposition by a refusal to provide a means of obtaining it.

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*Since revocation resulted from an unfair decision-making process which might not have occurred if the hearing had been given earlier, it cannot properly be argued that appellant was not deprived of special Federal programs because of the State Board's actions.

**Release to Federal community treatment centers is not a function of the Federal Parole Board, but of the Bureau of Prisons.

***See appellant's main brief for conflict in the Circuits.

Petitioner is entitled to credit from April 19, 1974, to June 4, 1975.

CONCLUSION

For the foregoing reasons and the reasons set forth in appellant's main brief, the writ should be granted.

Respectfully submitted,

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January 5, 1976

CERTIFICATE OF SERVICE

Jan. 5, 1976

I certify that a copy of this brief and appendix has been mailed to the Attorney General of the State of New York.

Phyllis Skloot Bamberger